PP

v.

KU YAHYA KU BAHARI & ANOR

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CRIMINAL APPEAL NO: A06-(B)1-99]
26 OCTOBER 2001

CRIMINAL PROCEDURE: *Trial - Misdirection of law - Trial judge held that defence did not create a doubt in prosecution's case after invoking presumption under s. 14 Anti-Corruption Act 1961 - Whether direction should have been whether defence rebutted presumption on a balance of probabilities - Whether conviction that followed an illegality*

CRIMINAL PROCEDURE: *Trial - Misdirection of law on burden of proof - Whether curable on appeal to High Court - Whether curable on further appeal to Court of Appeal - PP v. Khoo Hi Chiang - Criminal Procedure Code, s. 422 - Courts of Judicature Act 1964, s. 60(1)*

This was the public prosecutor's appeal against the decision of the learned High Court judge allowing the appeal by the respondents against their convictions and sentences by the sessions judge under ss. 3 and 4 of the Anti-Corruption Act 1961 ('the Act').

The issues were whether the learned High Court judge rightfully held that: (1) there was a misdirection of the law when the sessions judge failed to decide whether the respondents had rebutted the presumption under s. 14 of the Act on the balance of probabilities for the charge under s. 4(a) of the Act; and (2) he could not follow the case of *PP v. Khoo Hi Chiang* to maintain the convictions as that case did not apply to the High Court by virtue of s. 60 of the Courts of Judicature Act 1964 ('CJA').

Held:
Per Abdul Hamid Mohamad JCA

[1] There is no provision similar to s. 60 CJA applicable to the High Court in the exercise of its appellate jurisdiction. Therefore, *Khoo Hi Chiang* could not be relied upon by the High Court. The High Court in the exercise of its appellate jurisdiction may only rely on s. 422 of the Criminal Procedure Code to cure any "error, omission or irregularity …"

in appropriate cases but a misdirection on the burden of proof is not curable under that section. But, where there is a further appeal to this court, this court is at liberty to apply the provisions of s. 60(1) CJA. (p 121 b-c)

[2] Where a lighter burden of proof is applied at the close of the prosecution's case, the misdirection is not as serious as in the case where a lighter burden of proof is applied at the end of the case, provided that, in the former case, the conviction that follows at the end of the case is based on the test of beyond reasonable doubt. The defence called can only either weaken the prosecution's case or the prosecution's case remains the same. The accused can and will be convicted if only at the end of the case, the prosecution's case can still pass the test of beyond reasonable doubt. (pp 121 i & 122 a-f)

[3] The sessions judge failed to apply the test of "on the balance of probabilities" in considering whether the presumption under s. 14 of the Act was rebutted. The law required him to do so when he resorted to the presumption under s. 14 in calling the defence. Instead he considered all the charges against both the respondents together and concluded that their defence did not raise a reasonable doubt on the prosecution's case. Furthermore, the learned High Court judge rightly pointed out that the sessions judge had dismissed the defence of both accused on the charges in a very cursory manner. In the circumstances, this was not a proper case to invoke the proviso to s. 60 CJA. However, not all was lost by either party as the learned High Court judge had ordered a retrial. (pp 122 h-i & 123 a-c)

[Appeal dismissed; decision of High Court judge affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan pendakwa raya terhadap keputusan hakim Mahkamah Tinggi yang bijaksana membenarkan rayuan oleh responden-responden terhadap pensabitan mereka dan hukuman-hukuman oleh hakim mahkamah sesyen di bawah ss. 3 dan 4 Akta Anti-Rasuah 1961 ('Akta tersebut').

Isu-isunya adalah sama ada hakim Mahkamah Tinggi telah memutuskan dengan betulnya bahawa: (1) berlakunya salah arahan undang-undang ketika hakim mahkamah sesyen gagal untuk memutuskan sama ada responden-responden telah mematahkan tanggapan di bawah s. 14 Akta tersebut atas imbangan kebarangkalian bagi pertuduhan di bawah s. 4(a) Akta tersebut; dan (2) beliau tidak boleh mengikut kes *PP v. Khoo Hi Chiang* untuk mengekalkan pensabitan-pensabitan tersebut kerana kes itu tidak terpakai kepada Mahkamah Tinggi menurut s. 60 Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Tidak terdapat peruntukan yang sama dengan s. 60 AMK yang boleh dipakai kepada Mahkamah Tinggi dalam melaksanakan bidangkuasa rayuannya. Oleh itu, Mahkamah Tinggi tidak boleh bergantung kepada *Khoo Hi Chiang*. Dalam melaksanakan budibicara rayuannya Mahkamah Tinggi hanya boleh bergantung kepada s. 422 Kanun Prosedur Jenayah untuk memulihkan sebarang "error, omission or irregularity …" dalam kes-kes yang berpatutan tetapi salah arahan ke atas beban membukti tidak boleh diperbaiki di bawah seksyen itu. Namun demikian, di mana terdapatnya rayuan seterusnya kepada mahkamah ini, mahkamah ini bebas untuk memakai peruntukan-peruntukan s. 60(1) AMK.

[2] Di mana beban membukti yang lebih ringan dipakai pada penutupan kes pihak pendakwaan, salah arahan itu tidak begitu serius seperti kes semasa di mana beban membukti yang lebih ringan telah dipakai pada penutupan kes, melainkan bahawa, dalam kes yang terdahulu, pensabitan yang menyusul di penghujung kes tersebut adalah berdasarkan ujian di luar keraguan wajar. Pembelaan yang dipanggil hanya boleh sama ada melemahkan kes pendakwaan atau ianya kekal sama. Tertuduh boleh dan akan disabitkan hanya jika pada penghujung kes, kes pendakwaan masih boleh lulus ujian di luar keraguan yang wajar.

[3] Hakim mahkamah sesyen gagal untuk memakai ujian "on the balance of probabilities" dalam mempertimbangkan sama ada tanggapan di bawah s. 14 Akta tersebut telah dipatahkan. Undang-undang menghendaki beliau melakukan sedemikian bilamana beliau berpaling kepada tanggapan di bawah s. 14 ketika memanggil pembelaan. Sebaliknya beliau mempertimbangkan kesemua pertuduhan terhadap kedua-dua responden dan memutuskan bahawa pembelaan mereka tidak membangkitkan keraguan yang wajar ke atas kes pendakwaan. Lagipun, hakim Mahkamah Tinggi yang bijaksana menunjukkan dengan betulnya bahawa hakim mahkamah sesyen telah menolak pembelaan kedua-dua tertuduh tersebut ke atas pertuduhan-pertuduhan itu dengan cara yang tergesa-gesa. Dalam keadaan tersebut, ini bukannya sebuah kes yang wajar untuk menggunakan proviso kepada s. 60 Akta Mahkamah Kehakiman 1964. Walaubagaimanapun, mana-mana pihak tidak kehilangan kesemuanya kerana hakim Mahkamah Tinggi yang bijaksana telah memerintahkan perbicaraan semula.

[Rayuan ditolak; keputusan hakim Mahkamah Tinggi diikrarkan.]

Case(s) referred to:
Akin Khan Abdul Khanan v. PP, Malaysia [1987] 1 CLJ 348; [1987] CLJ (Rep) 40 ***(refd)***
Bahruni Ismail v. PP [1997] 3 CLJ 267 ***(refd)***
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(refd)***
Ishak Shaari v. PP [1997] 3 CLJ Supp 223 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 ***(refd)***
Tunde Apatira v. PP [2001] 1 CLJ 381 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1961, ss. 3(a)(ii), 4(a), 14
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, s. 422

For the appellant - DPP
For the respondents - M/s Haranay Roni & Anikah

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad JCA:

The respondents were separately charged but jointly tried in the Sessions Court. The first respondent was charged with two counts in case No. 61-15-97. The first charge was under s. 3(a)(ii) of the Anti-Corruption Act 1961 (Act No. 57) ("the Act") punishable under s. 3 of the Act. The second charge was under s. 4(a) and punishable under s. 4 of the Act.

For the first charge the first respondent was convicted by the Session's Court and sentenced to two weeks' imprisonment and a fine of RM3,000, in default three months' imprisonment. For the second charge, he was also sentenced to two weeks' imprisonment and a fine of RM3,000, in default three months' imprisonment. He was also ordered to pay a penalty of RM50 to the Government of Malaysia, in default one month's imprisonment. The Sessions Court also ordered that the sentences of imprisonment, other than the sentences of imprisonment in default, to run concurrently.

The second respondent was charged with three counts in case No. 61-16-97. The first two charges were under s. 3(a)(ii) and punishable under the same section of the Act. The third charge was under s. 4(a) and punishable under the same section of the said Act.

The second respondent was acquitted on the first charge but found guilty and convicted on the second and third charges. For the second charge he was sentenced to two weeks' imprisonment and a fine of RM3,000, in default, three

months' imprisonment. On the third charge he was also sentenced to two weeks' imprisonment and a fine of RM4,000, in default four months' imprisonment. He was also ordered to pay a penalty of RM150 to the Government of Malaysia, in default two weeks' imprisonment. The sentences of imprisonment, other than the sentences of imprisonment in default were ordered to run concurrently.

The respondents appealed to the High Court. The High Court allowed the appeal, quashed the convictions and sentences and ordered a retrial before another Sessions Court judge.

The appellant (Public Prosecutor) appealed to this court. The appeal was heard before Lamin Mohd. Yunus PCA, Abdul Kadir Sulaiman JCA and myself. We reserved our judgment. However, in the meantime, Lamin Mohd. Yunus PCA has retired leaving the two of us to give our decision.

We now state briefly the reasons why the learned judge allowed the appeal, quashed the convictions and sentences and ordered a retrial.

Regarding the charges under s. 3(a)(ii) the learned Sessions Court judge, at the end of the prosecution case, said that he was satisfied that the prosecution had proved its case beyond reasonable doubt and called upon the respondents to enter their defence. However, regarding the charges under s. 4(a) the learned Sessions Court judge invoked the presumption under s. 14 of the Act to call the respondents to enter their defence. Then, in considering the respondents' defence, the learned Sessions Court judge said:

> Bagaimanapun setelah mendengar keterangan pembela – saya tidak menerima dan tidak percaya dengan pembelaan OKT(1) dan OKT(2) dan pembelaan mereka tidak menimbulkan keraguan yang menasabah ke atas kes pihak pendakwa. Pembelaan kedua-dua OKT(1) dan OKT(2) adalah penafian semata-mata.

The comments of the learned High Court judge on this passage is as follows:

> When the prosecution is minded in invoking the presumption then the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumption on a balance of probabilities. This from a defence point of view is heavier than the burden of casting a reasonable doubt, but is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. So much for the law.
>
> Judging from the tenor of the grounds of the learned Sessions Court Judge, it would seem patently clear that he had invoked presumption of s. 14 of the said Act, when calling for the defence of both the accused for the charge under s. 4 of the said Act. Having done so, it behoves then on the defence to rebut this presumption on a balance of probabilities. The learned Sessions Court Judge

failed to appreciate the distinction involved, when invoking the said presumption, in terms of the burden of proof, which as I have mentioned, rests with the accused, to rebut on a balance of probabilities. The learned Sessions Court Judge instead went on to hold, that having heard the defence of both the accused, which was a complete denial, the accused, had failed to create a doubt in the prosecution's case. This is obviously a misdirection of law, as it should have been held that the accused had failed to rebut the presumption invoked under s. 14 of the Act, on a balance of probabilities for the charge under s. 4(a) of the Act.

The learned Sessions Court judge, has also to my mind in a very cursory manner dismissed the defences of both the accused on the charges, both under s. 3(a)(ii) and s. 4(a) of the said Act by this singular statement. To my mind it is incumbent on the learned Sessions Court Judge, as a separate exercise to decide whether the charges under s. 3(a)(ii) of the Act has been established beyond reasonable doubt by the prosecution, or if the presumption was invoked, whether the accused has rebutted it, on a balance of probabilities. I wish to reiterate that even if the presumption is invoked it does not detract the duty of the prosecution to still prove its case beyond reasonable doubt. The learned Judge has not done so, and this in itself is enough to occasion a miscarriage of justice.

The judgment of the learned judge is very clear to us. We have no reason to disagree with him.

The learned judge was invited by the Deputy Public Prosecutor to maintain the convictions in view of the "overwhelming evidence." In other words, the learned judge was urged to follow *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151 (SC). The learned judge however declined to do so on two grounds. First, to quote the learned judge:

The power under which the Supreme Court acted in *Khoo Hi Chiang (supra)* is a power that is specifically enacted for that Court and the Court of Appeal in the Courts of Judicature Act 1964. However, no such power is vested in the High Court.

The second ground concerns the seriousness of the misdirection in law on the burden of proof. This is what the learned judge says:

Such a misdirection of law on the burden of proof, cannot as suggested by the Deputy Public Prosecutor be passed over lightly as a mere irregularity, because it is incurably illegal as being in contravention of a strictly imperative provision. *Re Tan Boon Liat @ Allen & Anor ET AL* [1977] 2 MLJ 108. The trilogy of cases of *Harun bin Abdullah v. PP* [1998] 3 CLJ 184, *Surandran a/l Rajaretnam v. PP* [1998] 2 CLJ 207 & *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223, have enunciated that a misdirection of such a nature goes to the very root of the matter as it involves a principle of general importance in the administration of justice. The same view was expressed by the Supreme Court

> in *Yap Sing Hock v. PP* [1992] 4 CLJ 1950. As such I could not have affirmed the conviction or reversed it as suggested by the respective counsels. In *Thomas v. R* [1960] 102 CLR 584 a retrial was ordered where there was a misdirection on the standard of proof. Accordingly I quashed the conviction and set aside the sentence imposed and ordered a retrial before another Sessions Court Judge.

First, on the question whether the High Court is vested with similar powers as the former Supreme Court, the present Federal Court and the Court of Appeal to act as the Supreme Court did in *Khoo Hi Chiang*. Of course, common sense tells us that when a High Court sits in its appellate jurisdiction, it should have powers similar to those of the higher appellate courts as its function then is no different from the higher appellate courts. But, that is common sense and not law. Even though law is partly common sense, there are laws that do not make much sense, yet they are laws and have to be followed.

As far as the law is concerned, it appears that the issue was first decided by Augustine Paul J in *Ishak Shaari v. PP* [1997] 3 CLJ Supp 223. The learned judge, *inter alia*, said at p. 235:

> The power under which the Supreme Court acted in *Khoo Hi Chiang* is a power that has been specifically enacted to that Court and the Court of Appeal in the Courts of Judicature Act 1964 ('the Act'). However, no such power has been given to the High Court.

Ishak Shaari v. PP [1997] 3 CLJ Supp 223 was referred to by this court in *Harun bin Abdullah v. Public Prosecutor* [1998] 3 CLJ 184. This is yet another case of misdirection by the Sessions Court judge on the burden of proof at the close of the prosecution's case by applying the *prima facie* test. Abdul Malek Ahmad JCA (as he then was) delivering the judgment of the court, said at p. 197:

> … we must say that we are in full agreement with the decision in *Ishak Shaari v. PP* where the learned trial judge held the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. And as the error committed by the learned sessions court judge in misdirecting herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was incapable of rectification under s. 422 of the CPC.

And at p. 200:

> We must reiterate that since this was a breach of an explicit provision of the CPC and a principle of general importance in the administration of justice, it was not an error, omission or irregularity for which a finding, sentence or order could be reversed or altered under s. 422 of the CPC. This is irrespective of whether such error, omission or irregularity has occasioned a failure of justice.

> In effect, the said section cannot be applied for cases where the wrong standard of proof has been applied.
>
> This is certainly an illegality and not a mere error, omission or irregularity. But whether or not this was an issue in the High Court sitting as an appellate court, it can still be argued in a subsequent appeal before this court by applying the subsection as we did because the subsection has not differentiated between an appeal from a decision of the High Court sitting at first instance or of the High Court sitting as an appellate court. However, we would suggest that a similar provision be enacted for appeals from a subordinate court to the High Court so that the issue of illegality can be sorted out by the High Court either before, or without the necessity of, any further appeal to this court and to the Federal Court. Since the course of action that we took by virtue of the subsection would be equivalent to the powers of the High Court on appeal pursuant to s. 316 of the CPC, any amendment to include a provision similar to the proviso could appropriately be made in that section.

It should be noted that both *Ishak Shaari* and *Harun bin Abdullah* were decided prior to the amendment of s. 422 by Act A1015. However, as pointed out in *Harun bin Abdullah*, with which we agree:

> It is obvious that the amendment is merely to update the provisions consequent to the abolition of jury trials.

The effects, in our view, remain the same.

It is clear from that judgment that s. 422 of the Criminal Procedure Code cannot be invoked to cure a misdirection of the standard of proof on the prosecution, in that case at the close of the prosecution's case. It is also quite clear to us that whether or not the issue whether s. 422 of the Criminal Procedure Code may be invoked in a particular case was an issue in the High Court sitting as an appellate court, the issue may still be raised in a subsequent appeal before this court. In fact in that case, the Court of Appeal did test the evidence adduced by the prosecution at the close of the prosecution's case against the more stringent beyond reasonable doubt test, but found that the result would not have been the same and, consequently, the defence should not have been called. This is what the judgment says:

> With us applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.

It is to be noted that in the passages quoted earlier no reference was made to s. 60 of the Courts of Judicature Act 1964 unless the word "sub-section" is meant to refer to that section. It may well be so as s. 422 of the CPC that was under discussion does not have sub-sections.

In any event, we agree that, first, there is no provision similar to s. 60 of the Courts of Judicature Act 1964 applicable to the High Court in the exercise of its appellate jurisdiction. So, *Khoo Hi Chiang* cannot be relied on by the High Court. The High Court, in the exercise of its appellate jurisdiction may only rely on s. 422 of the Criminal Procedure Code to cure any "error, omission or irregularity ..." in appropriate cases but a misdirection on the burden of proof is not curable under that section. But, where there is a further appeal to this court, this court is at liberty to apply the provisions of s. 60(1) of the Courts of Judicature Act 1964, because as stated by this court in *Harun bin Abdullah* with which we agree:

> ... the subsection has not differentiated between an appeal from a decision of the High Court sitting at first instance or of the High Court sitting as an appellate court.

So, in the instant appeal, even though we agree with the view of the learned Judge of the High Court that the High Court has no power similar to that given to the Court of Appeal by s. 60(1) of the Courts of Judicature Act 1964, this court, hearing the appeal from the High Court is vested with such power and may invoke it in appropriate cases. In other words, whether this court hears an appeal from a High Court sitting in its original or appellate jurisdiction, this court, in appropriate cases, may invoke the provisions of s. 60(1) of the Courts of Judicature Act 1964 as was done by the Supreme Court in *Khoo Hi Chiang* and the Federal Court in *Tunde Apatira v. Public Prosecutor* [2001] 1 CLJ 381 (FC) the latter being a judgment of five judges.

The question that should now be considered is whether, in this case, we should invoke the provision of s. 60(1) of the Courts of Judicature Act 1964, in particular the proviso thereof.

First, it should be noted that the misdirection as to the burden of proof in this case is at the end of the defence case, not at the close of the prosecution's case as in *Khoo Hi Chiang, Ishak Shaari, Harun bin Abdullah, Surandran a/l Rajaretnam v. Public Prosecutor* [1998] 2 CLJ 207 (CA), *Bahruni bin Ismail v. Pendakwa Raya* [1997] 3 CLJ 267 (CA) and others.

In our view, where a lighter burden of proof is applied at the close of the prosecution's case, the misdirection, though serious, is not as serious as in the case where a lighter burden of proof is applied at the end of the case. This is because, in the former case, the misdirection may or may not affect

the finding at the end of the case provided the trial judge, at the end of the case, applies the correct beyond reasonable doubt test. Conviction comes only at the end of the case. Therefore, if at the end of the case, the trial judge applies the correct beyond reasonable doubt test, the conviction cannot be said to be wrong. Furthermore, even if at the close of the prosecution's case the trial judge applies the lighter *prima facie* test, it does not necessarily mean, depending on the evidence, that had the judge applied the beyond reasonable doubt test at that stage, the prosecution had not successfully proved its case. It may well be that had the judge applied the beyond reasonable doubt test, the decision of the trial judge would have been the same, which could merit the defence to be called. The defence having been called, the accused and his witnesses having given their evidence, the effect can only be either that the prosecution's case is weakened or remains the same. It cannot become stronger. So, if at the close of the prosecution's case, the evidence available is only sufficient to support a finding on a *prima facie* case, when the defence is closed, at the most, the charge will remain proved on a *prima facie* test. That would not warrant a conviction. The accused would be acquitted anyway. On the other hand, if at the close of the prosecution's case the trial judge applies the *prima facie* test but the evidence adduced would have supported a beyond reasonable doubt test, if applied, then at the end of the case, the prosecution's case may be weakened in which case the accused would also be acquitted. Only where at the end of the case, the case for the prosecution can still pass the beyond reasonable doubt test that the accused can and will be convicted. So, even where a lighter standard of proof is wrongly applied at the close of the prosecution's case, the end result is the same. The conviction, if recorded, at the end of the case is on the beyond reasonable doubt test. That cannot be said to be wrong.

Perhaps that is how *Khoo Hi Chiang* should be viewed. To say that in every case where the trial court has used the lighter burden of proof at the close of the prosecution's case to call for the defence, the conviction that follows, if it does follow, is an illegality and must be quashed for that reason alone is to nullify the decision of the Supreme Court in *Khoo Hi Chiang* and indirectly the decision of the Federal Court in *Tunde Apatira*, both of which are binding on this court.

However, that is not the situation in the present appeal. In the present appeal, the learned Sessions Court judge had not applied the test of "on the balance of probabilities" in considering whether the presumption had been rebutted, at all. The law requires him to do so where he had resorted to the presumption under s. 14, as he had done here in calling for the defence in respect of the charge under s. 4(a) – *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89 (PC), *Akin Khan b. Abdul Khanan v. Public Prosecutor, Malaysia* [1987] 1 CLJ 348;

[1987] CLJ (Rep) 40 (SC). But he had completely failed to do so. Instead he considered all the charges against both the accused together and concluded that their defence had not raised a reasonable doubt on the prosecution's case. In respect of the charges under s. 4(a) he should have considered whether the respondents had rebutted the presumption on the balance of probabilities. Furthermore, as rightly pointed out by the learned High Court judge:

> The learned Session's Court Judge, has also to my mind in a very cursory manner dismissed the defence of both the accused on the charges ...

In the circumstances, we are of the view that this is not a proper case for this court to invoke the proviso to s. 60 of the Courts of Judicature Act 1964 as was done in *Khoo Hi Chiang* and *Tunde Apatira*. After all, not all is lost by either party. The learned High Court judge had only ordered a retrial.

On these grounds we do not see any justification for us to interfere with the decision of the learned High Court judge in quashing the convictions and sentences and ordering a retrial. The appeal is therefore dismissed and the decision of the learned High Court judge is affirmed.